

STATEMENT OF COMISSIONERS CARL WOOD AND LORETTA LYNCH  
REGARDING DENIAL OF REQUESTS FOR REHEARING OF  
PG&E BANKRUPTCY SETTLEMENT

Today, three of the members of the California Public Utilities Commission voted to deny requests by the City and County of San Francisco, the City of Palo Alto, Aglet Consumer Alliance, and the Commission's Office of Ratepayer Advocates to reconsider the Commission's December 2003 decision approving a settlement of PG&E's bankruptcy case. In so acting, these Commission members have once again rushed to judgment, reaffirmed the Commission's illegal decision of a few months ago, and begun to illustrate some of the many ways in which the December 2003 decision violates state and federal law.

Like the December decision, today's action tramples our rights to have the necessary time and analysis in order to render a fully informed decision. Late last Friday, for the first time, we learned that the Commission's Legal Division would not be providing us with its formal evaluation of the arguments raised in the rehearing applications. Yesterday, we invoked our right under Section 307(c) of the Public Utilities Code to seek separate advice regarding the rehearing applications.<sup>1</sup> We further requested that deliberation on this matter be postponed to the Commission's next meeting on April 1<sup>st</sup> in order to allow us to obtain the advice to which we are entitled under the law. Instead of honoring the statutory requirement to provide us the required advice, the Commission majority voted to override our request and to proceed to vote on the matter.

In part because we lack the resources necessary to fully evaluate the rehearing applications, we have each concluded that we should abstain from today's vote. However, our decision to abstain is also the result of an intractable dilemma that arises out of the December settlement agreement. This is a dilemma not just for the two of us, but one that we believe exists for all of the members of this Commission.

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<sup>1</sup> Section 307(c) provides that the Commission's attorney shall "advise the commission *and each commissioner*, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof . . ." (emphasis added).

In short, abstaining is the only way that we believe we can avoid potentially serious legal consequences under the Confirmation Order issued by the federal bankruptcy court in the PG&E bankruptcy action, which is in turn premised on the Commission majority's approval of an illegal settlement. The bankruptcy court has deprived us of our decision-making discretion and – until that court order is vacated or stayed – will continue to deprive us and our successors of our ability to comply with various state laws and to make decisions without any preimposed restrictions. This circumstance violates the constitutions of both the state and the nation. It is a major reason we are appealing the bankruptcy court's order through the federal courts.

We want to explain our decision to abstain so that there is no misunderstanding about the dilemma that the court order has created for us and our colleagues.

The Confirmation Order and the Settlement Agreement on which it is based require that each Commissioner, acting in his or her official capacity, support the Settlement Agreement in every legislative, administrative and judicial forum.<sup>2</sup> Those same legal documents commit the commissioners “not to contest the validity and enforceability” of the adopted Settlement Agreement.<sup>3</sup> Under these requirements, we cannot freely deliberate and vote on the rehearing petitions -- the Settlement Agreement commits us in advance to vote in a specific way. This commitment violates the rehearing applicants' due process rights under the United States and California Constitutions. In addition, our oath of office binds us to uphold, not to violate the Constitution. We violate both our oaths and the Constitution itself if we vote to deny rehearing based on these requirements.

The Commission decision approving the Settlement Agreement is full of legal error. Voting to deny rehearing will only prolong the uncertainty of PG&E's emergence from bankruptcy on a sound, sustainable basis.

If we voted to grant rehearing, we would violate the Settlement Agreement and the Confirmation Order and become subject to sanctions, including contempt, in the

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<sup>2</sup> Settlement Agreement, ¶ 19, Confirmation Order, ¶ 10(xv).

federal court. This is because the Settlement Agreement waives our state and federal immunities,<sup>4</sup> surrenders this agency in advance to federal court jurisdiction,<sup>5</sup> and establishes liability for noncompliance in advance.<sup>6</sup> Every one of these enforcement provisions is illegal and is the subject of our appeal in federal court. Until our federal court appeal is heard and the threat of sanctions for voting with an open mind is removed, we are at risk of heavy penalties. Our decision to appeal the federal court order is thus the only way to preserve our ability to perform our constitutional duties.

Our fellow commissioners face this same dilemma. If they were inclined to reconsider any aspect of the Settlement Agreement, they would also risk court sanctions. As a result, they were unable to approach today's vote with anything other than an unalterably closed mind, in violation of the rehearing applicants' due process rights and their obligations under state law.<sup>7</sup>

Today's decision to deny rehearing was thus rendered in violation of the basic requirements of due process. By preventing the commissioners from carrying out their legal duties to give full and fair consideration to the rehearing applications,<sup>8</sup> the Settlement Agreement has already forced the Commission to abdicate its statutory and constitutional duties. In pursuing our appeal, we hope to prevent further unlawful abdications of the Commission's duties.

Dated March 16, 2004, at San Francisco, California.

Loretta M. Lynch  
Commissioner

Carl Wood  
Commissioner

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<sup>3</sup> Settlement Agreement, ¶ 21; Confirmation Order, ¶ 12.

<sup>4</sup> Settlement Agreement, ¶ 20.

<sup>5</sup> Settlement Agreement, ¶¶ 20, 22.

<sup>6</sup> Settlement Agreement, ¶ 23.

<sup>7</sup> See *Association of National Advertisers, Inc. v. Federal Trade Commission*, 627 F.2d 1151, 1170 (D.C. 1979) (due process requires that an administrative decision-maker be disqualified from voting on a matter when there has been a clear and convincing showing that the agency member has an unalterably closed mind on the matter).

<sup>8</sup> See Public Utilities Code §§ 1731(b), 1736.